

FILED
HELENA DIVISION

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NANCY GWEETNEY
CLERK DISTRICT COURT

FILED BY
DEPUTY

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5 Attorneys for The BNSF Railway Company
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8 MONTANA FIRST JUDICIAL DISTRICT COURT,

9 LEWIS & CLARK COUNTY

10 LOUIS M. MELE

) Cause No. BDV-2006-486

11 Charging Party,

) Judge

12 vs.

) PETITION FOR JUDICIAL REVIEW

13 BNSF RAILWAY COMPANY, a Delaware
14 corporation,

CV-06-37-HDW/M

INDEXED

15 Respondent

16
17 COMES NOW The BNSF Railway Company (BNSF) and petitions the Court for
18 review of the administrative order herein.

19 1. Statement of Facts for Jurisdiction and Venue

20 Respondent, The BNSF Railway Company (BNSF), is a Delaware corporation with its
21 registered agent in Yellowstone County, Montana. The District Court has jurisdiction
22 pursuant to Section 2-4-702 M.C.A., because BNSF hereby petitions for review of the
23 Montana Human Rights Commission Order Affirming Final Agency Decision, dated June 5,
24 2006. Venue is proper in Lewis & Clark County because the Human Rights Commission and
25 the Department of Labor are located in Lewis & Clark County.

1 2. Standing

2 BNSF is aggrieved because it has been unlawfully found to have discriminated against
3 Louis Mele and has been unlawfully subjected to the Order Affirming Final Agency Decision
4 of the Human Rights Commission in case No. 0051011229.

5 6. 3. Grounds for Review

7 The grounds for review are as follows:

8 a. Charging party Louis Mele filed a complaint of discrimination with the
9 Montana Department of Labor and Industry, alleging that BNSF had
10 discriminated against him in the area of employment because of a
11 perceived disability (back injury) in violation of the Montana Human
12 Rights Act, Title 49, Chapter 2 MCA, and the Americans with Disabilities
13 Act of 1990.

14 b. BNSF extended a conditional offer of employment to Charging Party for
15 the position of mechanical laborer on the railroad. Based on medical
16 information submitted by the applicant, BNSF determined that Charging
17 Party was temporarily not qualified at the time for that position due to the
18 recency of back surgery and determined that he posed an unacceptable
19 safety risk at that time, and thus, was not qualified at the time he applied
20 from the unique position of mechanical laborer. BNSF did not disqualify
21 applicant from any other job.

22 c. Hearing on the matter was held before the Hearing Examiner on August
23 15 and 16, 2005.

1 d. In a decision dated January 13, 2006, the Hearing Examiner determined
2 that the railroad discriminated against Charging Party on the grounds that
3 BNSF regarded Charging Party as disabled. The Hearing Examiner found
4 BNSF liable for emotional distress damages, front pay, and ordered BNSF
5 to undergo training in disability discrimination. The Hearing Examiner
6 also ordered several alternatives for the employment of Charging Party.
7
8 The Hearing Examiner's order was affirmed by the Human Rights
9 Commission.

10 e. The orders of the Department and the Commission are in violation of the
11 Montana Human Rights Act, Title 49, Chapter 2 MCA, and the Americans
12 with Disabilities Act of 1990, and in excess of the statutory authority of the
13 agency and affected by error of law that is clearly erroneous in view of the
14 reliable, probative, and substantial evidence on the whole record. M.C.A.
15
16 2-4-704.

17 f. Charging party failed to meet his burden of demonstrating that BNSF
18 perceived him as disabled as protected under the MHRA or ADA and
19 further could not demonstrate that BNSF regarded Charging Party as
20 incapable of performing a broad range of jobs. Charging party failed to
21 establish that he had a qualified disability as he had a temporary condition
22 and was not regarded as having a disability. As such, the agency had no
23 jurisdiction over this matter. The order is unsupported by the evidence,
24 was clearly erroneous in view of the reliable, probative, and substantial
25 evidence and is contrary to law.
26

- g. The Hearing Examiner's findings that BNSF did not appropriately determine that Mele was at an increased risk of harm based on an individualized assessment was clearly erroneous in view of the reliable, probative, and substantial evidence.
- h. Charging party presented no probative evidence supporting an award of damages for front pay, benefits and emotional distress and the findings were unsupported by the evidence and clearly erroneous in view of the reliable, probative, and substantial evidence.
- i. The prospective relief ordered by the agency to include employment of Charging Party and the permanent injunction is unlawful and exceeds the authority of the agency and constitutes an abuse of discretion.
- j. The order by the Commission affirming the decision of the Hearing Examiner is faulty and unlawful for the same reasons stated in Subparagraphs a through i, supra.

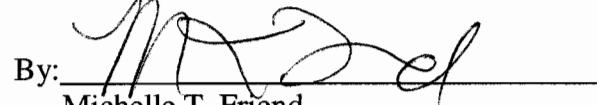
4. Relief Requested

Wherefore, The BNSF Railway Company respectfully requests a complete dismissal of the Charging Party's complaint, or in the alternative modification or dismissal of those portions of the order that are clearly erroneous, unsupported by evidence or in excess of the authority of the agency.

BNSF further requests any additional relief the court deems just.

DATED this 5th day of July 2006.

1 HEDGER MOYERS LLP
2
3

4 By: 
5 Michelle T. Friend
6

7 Attorneys for The BNSF Railway Company
8

9 **CERTIFICATE OF SERVICE**
10

11 I, do hereby certify that I have served a true and correct copy of the foregoing
12 **PETITION FOR REVIEW** upon individual(s) listed below by the following means:
13

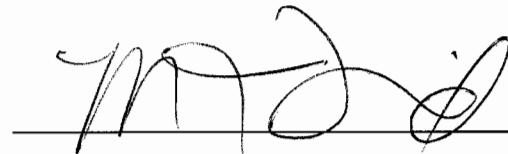
14 Brian Bramblett
15 MELOY TRIEWEILER
16 P.O. Box 1241
17 Helena, Montana 59624-1241
18

19 [x] U.S. Mail
20 [x] Facsimile
21 [] Express Mail
22 [] Hand Deliver
23

24 State of Montana
25 Dept. of Labor & Industry
26 Employee Relations Div./Human Rights Bureau
27 P.O. Box 1728
28 Helena, Montana 59624-1728

29 [x] U.S. Mail
30 [] Facsimile
31 [] Express Mail
32 [] Hand Deliver
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34 DATE: 07/05/06
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